[Cite as *Cavins v. S&B Health Care, Inc.*, 2015-Ohio-4119.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

LISA CAVINS	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26615
	:	
v.	:	Trial Court Case No. 2013-CV-7540
	:	
S&B HEALTH CARE, INC.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 30th day of September, 2015.

. . . . . .

DWIGHT D. BRANNON, Atty. Reg. No. 0021657, MATTHEW C. SCHULTZ, Atty. Reg. No. 0080142, 130 West Second Street, Suite 900, Dayton, Ohio 45402
Attorneys for Plaintiff-Appellee

LUCIAN BERNARD, Atty. Reg. No. 0047159, 178 Barnwood Drive, Edgewood, Kentucky 41017
Attorney for Defendant-Appellant

. . . . . .

WELBAUM, J.

{¶ 1} Defendant-Appellant, S&B Healthcare, dba Home Healthcare by Black Stone ("Black Stone") appeals from a jury verdict of $250,000 in favor of Plaintiff-Appellee, Lisa Cavins, on Cavins' claim of disability discrimination. In support of its appeal, Black Stone contends that the trial court prejudicially erred by failing to bifurcate the trial pursuant to R.C. 2315.21(B). Black Stone also contends that the verdict is against the manifest weight of the evidence.

{¶ 2} We conclude that Black Stone waived any error regarding bifurcation by failing to properly transmit the record or to supplement the record pursuant to App.R. 9(C). We further conclude that even if the error had not been waived, any error would have been harmless, because the jury did not find that Black Stone acted with malice. In addition, we conclude that the jury did not clearly lose its way and create a manifest miscarriage of justice by finding that Black Stone improperly discriminated against Cavins, or in awarding damages to Cavins. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} Appellant, Lisa Cavins, was employed as a registered nurse by Black Stone from April 24, 2007 to July 22, 2011, when she was terminated. Black Stone provides home healthcare services for the infirm and elderly, and Cavins visited patients at home, providing wound care and implementing the medical plan of care for patients. Typically, she made between 40 and 70 visits per week, and was paid per visit.

{¶ 4} Prior to May 23, 2011, Cavins had only one disciplinary write-up, in October

2007, for performing wound care on a patient without a doctor's order. Her supervisor, Melanie Mobley, described her as a "great nurse" and a "wonderful patient advocate" in a Christmas card sent in December 2010. Annual evaluations of Cavins done in April 2009 and April 2010 also resulted in above average scores.

{¶ 5} The April 2009 evaluation form contained a score under "Duties and Responsibilities" for documentation. The printed form read as follows: "Documents all client-related activities and turns documentation in weekly with the exception of Oasis assessments which are turned in within 48 hours." Defense Ex. B, p. 2.[1] This is consistent with Black Stone's Administrative Policy Manual, which states that the responsibilities of a registered nurse, among others, are to "* * * [p]repare clinical and progress notes documenting services provided and client care related activities to be submitted to Home Healthcare by Black Stone on a weekly basis." Defense Ex. K, p. II-7, #11. According to Cavins, she was required to turn in documentation weekly to Black Stone, and was never told to submit reports daily until July 2011.

{¶ 6} On Cavins' 2009 evaluation form, the word "weekly" is crossed out and the word "daily" is written in. Cavins' supervisor testified that she crossed out the word "weekly" when she did the evaluation because Black Stone had converted several years earlier to an electronic medical record and their evaluation form did not keep up with that. In contrast, Cavins testified that she did not believe the word "weekly" was crossed out when she was given her evaluation in 2009.

{¶ 7} On the 2009 evaluation form, Cavins was rated below average in the

[1] Oasis is the system used to document the initial evaluation of patients when they are entered into Black Stone's home healthcare system.

documentation category, and "timeliness of paperwork" was included under areas of improvement. In 2010, Cavins again received above average scores, and a below-average score for documentation. However, on this form, the areas of improvement were listed only as "seeking alternatives to daily or bid visits, attendance at meetings and educational offerings." Defense Ex. C, p. 2.[2]

{¶ 8} In December 2010, Cavins filed a workers' compensation claim due to problems she was having with her arms and wrists. This was not based on a specific incident, but happened gradually over the four years Cavins worked for Black Stone, due to the amount of charting that needed to be done. The claim did not proceed formally eventually, as it was resolved by Black Stone providing Cavins with voice-activated software and a computer to assist with documentation. As was noted, Cavins' supervisor, Melanie Mobley, sent her a Christmas card in December 2010. The following message was enclosed with the card:

> Lisa – you never cease to amaze me with your endless energy in keeping up with all of your patients. I know you are a wonderful patient advocate for your people and always have their best interest at heart. You are a great nurse. Just don't burn out on me! Get some rest. Melanie.

Defense Ex. X, p. 2.

{¶ 9} On January 2, 2011, Cavins was involved in an automobile accident while traveling to a patient's home. At the time, Cavins was sitting at a stop sign and was rear-ended by a car that left the scene. The police transported Cavins to Springfield Regional Hospital, with complaints of neck and shoulder pain, headache, and dizziness on the right

---

[2] "Bid" means twice a day.

side of the face. According to Cavins, she was in severe pain. She was treated and released, and reported the accident to Black Stone. On January 3, 2011, Cavins filled out an Incident Report, as required by Black Stone's policy, and the report was signed by her supervisor, Mobley, the same day. Plaintiff's Ex. 2. The report indicated that a follow-up visit was scheduled with Cavins' doctor, Dr. Macy, on January 5, 2011.

{¶ 10} After the first accident, Dr. Saliba, Cavins' workers' compensation doctor, prescribed Tylenol II, as well as Cymbalta and Topamax, which help with nerve pain. Cavins testified that she continued to work because she could not afford to take off work. She also testified that after the first accident, she was treated differently by Black Stone. On several occasions, her supervisor, Mobley, asked her to add unnecessary things to patient documentation. Mobley was also short-tempered on many different occasions and failed to order supplies that Cavins needed.

{¶ 11} On May 23, 2011, Cavins received a verbal warning for excessive lateness with charting/documentation. According to Mobley, paperwork for billing and reimbursement, like patient signature sheets (proving a nurse had made a visit) and mileage records, were due weekly, while clinical notes were to be done daily. The description of the problem on the disciplinary record was "[l]ong term problem with not having paperwork completed and turned in by the designated deadline, including all written and electronic documentation." Plaintiff's Ex. 4. The recommendation was that "Deadline for turning in written work and electronic documentation is 8 <u>am</u> Monday morning – <u>no exceptions</u>." (Emphasis sic.) *Id.* This conflicts with Mobley's testimony that some reports were due daily. Mobley indicated at trial that she probably made a

mistake in writing out the disciplinary report. Trial Transcript, p. 265.[3]

{¶ 12} On the disciplinary report, Cavins stated that "I am having difficulty doing electronic work R/T chronic pain in hand, elbow, shoulders & neck." *Id.* at Plaintiff's Ex. 4. Early in the morning on June 2, 2011, Cavins wrote an email to a co-worker, expressing appreciation for her help in obtaining a computer and other equipment that helped her document more easily. Cavins discussed the amount of pain she suffered daily, and indicated that she needed to overcome her struggles and be more productive in her job. Defense Ex. AA.

{¶ 13} Later that same day, Cavins was involved in another automobile accident. Cavins' daughter, Brittany Brewer, was driving Cavins' car because Cavins had been having pain. As Brewer began to turn into the parking lot of a patient's residence, another car ran into Cavins' car. Brewer sustained a broken arm and was taken by ambulance to the emergency room in Springfield. Because of her daughter's injury, Cavins did not immediately seek treatment for her own problems. However, the next day, Cavins went to the emergency room at a hospital in Kettering, Ohio (rather than a location closer to her home).[4] At that time, Cavins complained of shoulder and neck pain. She then followed up with her family physician on June 6, 2011.

{¶ 14} Cavins testified that she notified Black Stone about the June 2, 2011

---

[3] A former co-worker of Cavins did testify that documentation of patient visits is supposed to be done in the patient's home and submitted within 24 hours. Trial Transcript, p. 324. However, no written policy to this effect was submitted at trial. Instead, as was noted, the Black Stone Administrative Policy Manual requires weekly submission of clinical and progress notes. *See* Defense Ex. K, p II-7, #11.

[4] The implication by Black Stone at trial was that Cavins was not injured in the accident and that her motives for going to a different hospital were suspicious.

accident. However, the Black Stone employees, including Mobley, denied knowing about the claim prior to Cavins' termination, and the incident report produced at trial contained only Cavins' signature. *See* Plaintiff's Ex. 6. According to Cavins, the harassment from Black Stone increased after the second accident.

{¶ 15} There appears to be no dispute that Cavins had a heavy workload. Cavins testified that normal full-time employment was 20-25 visits per week, but she was always required to do more, including being forced into working on weekends, covering for other people, and picking up extra patients. Cavins also indicated that she had not had a holiday off since starting to work in 2007. For example, she saw 13 patients on the Fourth of July in 2011. Cavins stated that she had told Mobley multiple times that she had too many visits, and asked if someone could cover for her. However Mobley said everyone's schedule was full. In contrast, Mobley stated that she never forced Cavins to take visits.

{¶ 16} At some point before the June 2, 2011 accident, Dr. Macy had referred Cavins to Dr. Nguyen, a pain management doctor. Between the June 2, 2011 accident and her first appointment with Dr. Nguyen on July 1, 2011, Cavins continued to take Tylenol II for her pain. On July 1, 2011, Dr. Nguyen ordered Duragesic or Fentanyl patches, and Cavins began using this patch. She testified that she did not believe the patch impaired her work. No patient or family member of a patient complained about her work during this time.

{¶ 17} Cavins' birthday was on July 8, 2011, which was a Friday. Prior to July 7, 2011, Cavins had asked her supervisor, Melanie Mobley, if she could take her birthday off work, and Mobley agreed. On the evening of July 7, 2011, Cavins wrote Mobley an

email reminding her that she would be off July 8, 9, and 10, and that another nurse would be covering her visits.

{¶ 18} At some point around July 7, 2011, Mobley received a report from another employee, Kathryn Reed, who had talked to Cavins on the phone. Reed concluded that Cavins sounded impaired in some way. Reed asked Cavins if she were okay, and Cavins volunteered that she was on a morphine patch, which is a strong narcotic. This was actually incorrect, as Cavins was on a Duragesic or Fentanyl patch, which is a different chemical compound from morphine. Fentanyl dosages do not correlate with morphine; Fentanyl is designed to be longer-acting, over a much longer period of time. However, Fentanyl is a Schedule II drug.

{¶ 19} When Mobley heard about the patch, she was immediately alarmed. Mobley then spoke to her supervisor, Vicky Flatter. Chris Doggett, Black Stone's Vice President, was also notified. After Doggett was notified, she contacted Deborah Meyer, Black Stone's human resources manager, and Liz Pierson, Black Stone's legal counsel.

{¶ 20} On July 8, 2011, Mobley sent Cavins an email telling her that she had lightened her workload for the next week. Mobley also asked Cavins to come to the office Monday, July 11, 2011, for a meeting with Mobley and Flatter. After meeting with Mobley and Flatter, Cavins was given three written warnings and was temporarily suspended.

{¶ 21} One written warning was because Cavins had violated a Black Stone policy or procedure on July 7, 2011. According to Mobley, Cavins violated Black Stone's "Drug-Free Work Place" policy by failing to let her supervisor know that she was taking medication. The policy in question, however, does not require employees to notify their

supervisors if they are taking medication. Instead, the policy states that:

> No employee is to engage in activity for, or be present on office or client premises, while in possession of or under the influence of illegal drugs, alcohol or controlled substances, which could affect job performance, health or safety.

Defendants' Ex. R., p. III-5.

{¶ 22} The basis for the written warning was the comment made to Reed about the morphine pain patch, as well as a phone conversation Cavins had with another employee, Carey Hale, on July 8, 2011, when, according to Mobley's testimony, Cavins appeared to be almost incoherent, with slurred speech and unable to express herself clearly. As a result of this written warning, Cavins was temporarily suspended until she could produce a note from her physician that she was able to drive as part of her job and was not using impaired judgment in the care of her patients.[5]

{¶ 23} In response to the charge, Cavins stated that she had been up all night doing paperwork and had rested for a few hours before calling into the office after just waking up. She also stated that she was not wearing a pain patch at the time and was not doing patient care. She further indicated that the pain patch had been ordered to treat neck and shoulder pain from an auto accident. The fact that Cavins had "pulled an all-nighter" had been previously mentioned in an email on charting that Cavins had sent

---

[5] Hale testified at trial, and stated that she did not think she used the word "incoherent," but had used the words "slurred speech" in describing her phone conversation with Cavins. Trial Transcript, p. 330. Hale told Mobley that she had a hard time understanding Cavins. She reported the conversation because she was concerned about Cavins driving and whether she was seeing patients. There is no indication that Cavins was seeing patients at the time the conversation occurred.

to Mobley on July 8, 2011, at 6:33 a.m. *See* Plaintiff's Ex. 13. During that email, Cavins also asked Mobley why she was so angry with Cavins all the time.

{¶ 24} The second written warning, also dated July 7, 2011, was for excessive lateness with charting/documentation. The description for this violation indicated that Cavins' last DAR (Daily Activity Report) was submitted on June 27, and that there was no documentation for visits from July 4 to July 6 except the time in, time out, IVs, and any lab draws.[6] The description further indicated that Cavins continually submitted all DARs on Sunday or Monday morning instead of daily. The plan/recommendation was that Cavins' case load be decreased to 25 visits per week with mandatory submission of DARs daily. The plan further stated that if the DARs were not submitted daily, Cavins would be placed on probation with the possibility of termination. Cavins refused to sign the disciplinary form, stating that her previous verbal warning had stated that all paperwork and electronic documentation would be due Monday at 8:00 a.m. Cavins also stated that July 6 was a Wednesday, and documentation, therefore, would not be due until the following Monday, July 11, 2011, at 8:00 a.m. Plaintiff's Ex. 9.

{¶ 25} The third written warning given to Cavins was for a violation of a Black Stone policy on July 8, 2011. This was based on Cavins' failure to submit a formal paper request for a day off on July 8, 2011. Cavins was not given a copy of any policy she violated, and Black Stone did not submit any written policy at trial indicating that employees must submit formal written requests. Black Stone also did not provide a copy of any written request forms at trial.

---

[6] A DAR is basically for payroll purposes. It lets Black Stone know what patients a nurse sees. When documentation on visits is completed, the nurse's computer transfers that to Black Stone.

{¶ 26} According to Cavins, she had never seen such a request form, and had never previously submitted a form in order to take a day off. Cavins also stated that she had verbal approval two to three weeks earlier, and had emailed Mobley on July 7, 2011 to remind her that she was taking vacation on July 8, 2011.

{¶ 27} Another employee who testified indicated that while there is a form that she had filled out to request time off, she had also requested vacation time verbally, and had been granted the time without having to fill out a form. There is no indication that this employee was disciplined for failing to fill out a written form.

{¶ 28} Cavins was suspended from work from July 11 to July 18, 2011. On July 18, she provided her supervisors with a note from her family doctor, Dr. Macy, indicating that she was currently using Duragesic as prescribed. Dr. Macy also stated that Cavins was "able to drive and work, including doing patient assessments and patient care, without restriction." Plaintiff's Ex. 14. Cavins was allowed to return to work, and worked July 19, 20, and 21 (Tuesday, Wednesday, and Thursday).

{¶ 29} Cavins had a second meeting with her supervisors, at her request, during which she was told that she was a liability while using the patch. On July 21, 2011, Cavins wrote an email to Mobley, Flatter, and Doggett, offering to stop using the Fentanyl patch if they and their attorney had concern about it. No response was apparently made to this email.

{¶ 30} On Thursday, July 21, 2011, Mobley was allegedly told that Cavins had been in contact with former clients and had told a co-worker not to let anyone know she was making contact. After receiving the information about Cavins' alleged contact with former patients, Mobley spoke with her supervisor. A conference call then occurred

between five people – Mobley, Flatter, Doggett, Meyer, and Pierson, who concluded that this was grounds for termination.

{¶ 31} On July 22, 2011, Cavins called in sick and did not work. Mobley, Flatter, and Doggett went to Cavins' house on Friday, July 22, 2011, because Cavins had failed to show up for a scheduled meeting. It was Mobley's intent to deliver the termination notice at that time. Cavins had not been notified of the alleged charge against her, nor had she been given an opportunity to respond. At trial, Cavins denied having improperly contacted any patients, and Black Stone did not present evidence from any former patient who had been contacted, or from the co-worker who allegedly made the statement about Cavins' contacting patients.[7] Cavins also testified that she was ill on July 22, 2011, and did not hear anyone come to her home.

{¶ 32} On Monday, July 25, 2011, Cavins emailed Mobley from her personal email account, indicating that she had been ill and would follow-up again with the doctor that day to let Mobley know when she could start working again. At that time, Cavins stated that she hoped the doctor would not keep her off work the "full two weeks." *See* Defendant's Ex. PP.

{¶ 33} Mobley responded by email, informing Cavins that she had been terminated. However, Cavins denied receiving this email until after a Black Stone employee came by her house on July 26, 2011, to pick up Black Stone's equipment. On that date, Cavins' daughter told her that an employee had come to the house, and that she had been terminated.

{¶ 34} At trial, Cavins presented a letter from her doctor, Dr. Macy, dated July 26,

---

[7] The identity of this co-worker was not mentioned at trial.

2011. The letter indicated that Cavins was under his medical care and was excused from work from July 22 to July 29, 2011. Dr. Macy stated that Cavins could return to work on August 1, 2011. Defense Ex. DDD. According to Cavins, Dr. Macy excused her from work because she was having excruciating pain and stomach issues. Dr. Macy felt she was unable to work for that period of time.

{¶ 35} There was contradictory testimony from the Black Stone employees regarding the reasons for the termination. Mobley testified that nothing in the termination conversation concerned the Fentanyl patch. In contrast, Meyer, Black Stone's human resources manager, testified that people indicated in the termination conversations that Cavins had been using a Fentanyl patch and that concerned other people about potential liability. In addition, Doggett, Black Stone's Vice President, testified that the Fentanyl patch was part of the termination.

{¶ 36} On the disciplinary record pertaining to the termination, Mobley stated that the termination was for a HIPAA violation. Plaintiff's Ex. 18. This is the only ground listed. *Id.* Cavins testified that she never received a copy of this document; instead, she obtained it from the workers' compensation website.

{¶ 37} After Cavins' termination, Black Stone unsuccessfully opposed Cavins' workers' compensation claims, testing and treatment, and application for a living wage maintenance. Cavins did not work at all in 2012 or 2013. The doctors would not let her go to work until she had treatment and they found out what was wrong. Trial Transcript, p. 182. On February 24, 2014, Cavins returned to work for another employer, but was on modified duty.

{¶ 38} In January 2012, Cavins filed suit against Black Stone, alleging breach of

implied contract, disability discrimination under R.C. 4112, and retaliation for filing a workers' compensation claim. That action was voluntarily dismissed without prejudice in December 2012. Subsequently, in December 2013, Cavins re-filed her complaint against Black Stone, again alleging disability discrimination and retaliation with respect to the workers' compensation claims. In addition, Cavins included a claim against her former attorneys, Lori Strobl, Kathy Blevins, and Strobl & Associates, L.P.A. (collectively, "Strobl") for legal malpractice and breach of contract.

{¶ 39} On March 17, 2014, the trial court granted Strobl's request to bifurcate the claims against Black Stone from the claims against Strobl, and to hold separate trials. On July 30, 2014, the trial court denied Black Stone's motion for summary judgment, finding genuine issues of material fact on the disability discrimination and workers' compensation retaliation claims. In the same decision, the court agreed that the jury demand with regard to the workers' compensation retaliation claim should be struck. Ultimately, the disability discrimination claims and workers' compensation retaliation claim were tried at the same time, with the jury deciding the merits of the disability claim and the judge deciding the retaliation claim.

{¶ 40} Prior to trial, Black Stone submitted proposed jury instructions, which included Defendant's Proposed Special Interrogatory #9. This interrogatory instructed the jury on punitive damages and asked that the jury find whether Black Stone acted with malice, and if so, what amount of punitive damages should be awarded to Cavins. *See* Doc. #82, Defendant's Proposed Jury Instructions, pp. 26-27. Similarly, Cavins submitted instructions and interrogatories relating to punitive damages. See Doc. #80, Plaintiff's Proposed Jury Instructions, p. 24, and Doc. #81, Plaintiff's Proposed Jury

Interrogatories, pp. 5-6 and 10-11. The record does not contain a transcript of any conferences regarding the jury instructions, but the trial court instructed the jury on punitive damages and included an interrogatory asking the jury to decide if Black Stone had acted with malice. The court did not include a verdict form for punitive damages.

{¶ 41} After deliberating, the jury found Black Stone guilty of disability discrimination and awarded Cavins the following damages: $125,000 for back pay; $75,000 for front pay, and $50,000 for compensatory damages. In addition, the jury found that Black Stone did not act with malice. The trial court also entered its own verdict, finding that Black Stone was not guilty of retaliation regarding the workers' compensation claims. Subsequently, the court denied Black Stone's motions for judgment notwithstanding the verdict ("JNOV") and for a new trial.

{¶ 42} Black Stone appealed, raising two assignments of error with respect to the jury trial.

II. Alleged Error in Failing to Bifurcate

{¶ 43} Black Stone's First Assignment of Error states that:

> The Trial Court Committed Prejudicial Error by Failing to Bifurcate the Trial in Accordance with R.C. 2315.21(B).

{¶ 44} Under this assignment of error, Black Stone argues that the trial court erred in permitting the trial to proceed without bifurcation in accordance with R.C. 2315.21(B), despite having granted Black Stone's motion to bifurcate.

{¶ 45} Concerning bifurcation, R.C. 2315.21(B)(1) states that:

> In a tort action that is tried to a jury and in which a plaintiff makes a

claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

{¶ 46} In the case before us, the record, as transcribed, and the pleadings filed prior to trial, do not contain a request by Black Stone to bifurcate the proceedings. In a motion for new trial filed after the verdict, Black Stone argued that irregularities in the proceedings existed because the trial court had granted its motion to bifurcate the proceedings under R.C. 2315.21(B), but had permitted malice to be raised and had

allowed jury instructions on malice.

{¶ 47} In support of the motion for new trial, Black Stone submitted the affidavit of its counsel, who stated that the court had granted Black Stone's motion to bifurcate during an in-chambers proceeding on August 25, 2014. In the affidavit, Black Stone's counsel also stated that when jury instructions were discussed on August 27, 2014, the court refused to bifurcate the issue of punitive damages from the jury and included instructions on punitive damages in the jury instructions. Finally, according to Black Stone's counsel, a general objection to the punitive damages instructions was entered on the record before the jury retired.

{¶ 48} In its decision overruling the motion for new trial, the court recalled sustaining Black Stone's motion to bifurcate. Doc. #142, Decision and Entry, p. 1. The court then made the following further comments: (1) Black Stone presented almost no objections at trial to the few statements that opposing counsel made about Black Stone's alleged malicious conduct; (2) the jury "returned monetary awards well within the boundaries of argument to evidence"; (3) there was no indication that the jury lost its way; and (4) the jury had entered an interrogatory finding that Black Stone had not acted with malice. As a result, the court concluded that the error, if any, was harmless, and overruled the motion for new trial. The trial court did not discuss what, if anything, had occurred on August 27, 2014.

{¶ 49} Despite what Black Stone's counsel said in the trial court about what had occurred, there are two methods of properly preserving the trial court record for purposes of appeal. The first method is a transcript of proceedings, recorded in compliance with App.R. 9(A)(2), and the second is a statement of the proceedings, prepared in compliance

with App.R. 9(C). "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). If the conferences in question were not recorded, Black Stone could have prepared a statement of the proceedings under App.R. 9(C). However, Black Stone failed to pursue this method of preserving the record.

{¶ 50} In addition, there is no evidence in the record concerning what transpired at the conferences on August 25 and August 27, 2014, other than the trial court's recollection of having granted a motion to bifurcate on August 25, 2014. As was noted, the trial court did not address what, if anything, occurred at the conference on August 27, 2014.

{¶ 51} Cavins' counsel does appear to have agreed, in responding to the motion for new trial, that the parties discussed the proper method of bifurcation. Ultimately, according to the parties, the trial court decided the proper course would be to submit an interrogatory to the jury asking whether the plaintiff had proven by clear and convincing evidence that the defendant acted with malice. *See* Doc. #111, p. 4, and Doc. #102, Affidavit of Paul Hirsch, ¶ 3-12. Nonetheless, the record should have been properly clarified by a statement under App. 9(C), given what occurred both before and after the August 25, 2014 conference where bifurcation was allowed.

{¶ 52} Specifically, on August 22, 2014, Black Stone submitted jury instructions that included "Proposed Special Interrogatory #9." Doc. #82 at pp. 26-27. This interrogatory stated that Black Stone's actions or omissions were alleged to have demonstrated "malice or aggravated or egregious fraud against Plaintiff." *Id.* at p. 26. The interrogatory defined actual malice and also defined the clear and convincing burden

of proof that was required. The interrogatory then asked the jury to decide if Cavins had proven malice by clear and convincing evidence. In the event of a "yes" answer, the jury was asked to decide what amount of punitive damages should be assessed against Black Stone. *Id.* at pp. 26-27.

{¶ 53} Cavins also submitted proposed jury instructions that included instructions on punitive damages and malice, as well as jury interrogatories requesting a decision on whether punitive damages should be awarded, and, if so, the amount. Doc. #80 at p. 24; Doc. #81 at pp. 5 -6 and 10-11.

{¶ 54} As was noted, the trial court apparently agreed during a conference on August 25, 2014, to bifurcate punitive damages. Thereafter, in instructing the jury, the court instructed the jury to decide whether Black Stone would be liable for punitive damages. The court also defined malice and the appropriate burden of proof. *See* Trial Transcript, p. 413. The court then instructed the jury to complete interrogatory No. 3, which asked the jury to decide whether Black Stone had acted with malice. *Id.* at p. 416.

{¶ 55} After the court finished instructing the jury, the court asked the parties if they had any objections. At that time, Cavins' counsel asked the court to allow consideration of punitive damages based on the unconstitutionality of R.C. 2315.21, and to include all the other instructions Cavins had submitted during the jury conference. *Id.* at p. 420. In response, Black Stone's counsel made the following statement:

> I was a little more limited, Your Honor. We would like to place on the record *our objection to the Court's failure to include Defendant's Proposed Instruction Number 9 or any punitive damages.*

(Emphasis added.) *Id.*

{¶ 56} This statement by defense counsel is inconsistent with Black Stone's claim that the trial court should have bifurcated the consideration of punitive damages. As a result, regardless of the affidavit subsequently submitted, the record appears to indicate that Black Stone wanted the trial court to include its instruction on punitive damages and a verdict form that would permit the jury to award a specific amount of punitive damages, assuming that the jury found that Black Stone acted with malice. Accordingly, the record should have been clarified pursuant to App.R. 9(C). Since Black Stone failed to do so, any error in this regard has been waived.

{¶ 57} "In the absence of an attempt to reconstruct the record pursuant to App.R. 9, an appellant waives any error concerning the incomplete record." *State v. Hill*, 4th Dist. Meigs No. 96 CA 4, 1996 WL 754250, *5 (Dec. 30, 1996), citing *State v. Jells*, 53 Ohio St.3d 22, 559 N.E.2d 464 (1990). (Other citations omitted.) *See also Leslie v. Kroger Co.*, 2d Dist. Clark Nos. 2824, 2899, 1992 WL 136789, *3 (June 18, 1992) (noting that the record does not portray error where the appellant failed to use App.R. 9(C) to supplement the record). *Accord Clay v. Delph*, 2d Dist. Greene No. 83-CA-91, 1984 WL 4872, *1 (May 2, 1984) (holding that "[w]ithout a proper record or statement of the proceedings below, it is impossible for this Court to determine whether or not the errors alleged by appellant to have occurred are meritorious"), and *Namenyi v. Tomasello*, 2d Dist. Greene No. 2013-CA-75, 2014-Ohio-4509, ¶ 29 (finding that regularity of the proceedings must be presumed where appellant failed to file an acceptable alternative statement of the record).

{¶ 58} However, even if the record were clear, any error would have been harmless. Prior to the trial of this case, the Supreme Court of Ohio held that under R.C.

2315.21(B), "a trial court, on the motion of any party, is required to bifurcate a tort action to allow presentation of the claims for compensatory and punitive damages in separate stages." *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 13. Accepting Black Stone's statements in the trial court as true, the trial court complied with this requirement, because it granted the bifurcation request. Furthermore, even if this were otherwise, instructing the jury on malice was harmless, because the jury did not find that Black Stone acted with malice. *See Volpe v. Heather Knoll Retirement Village, Inc.*, 9th Dist. Summit No. 26215, 2012-Ohio-5404.

{¶ 59} In *Volpe*, the court of appeals stated that:

> The trial court did not bifurcate the issue of punitive damages as required under Section 2315.21(B). The jury, however, did not award Mr. Volpe any punitive damages. While [the defendant] has argued that the punitive-damages instruction communicated a message to the jury that may have bled over into its deliberations on liability and compensatory damages, there is nothing in the record that suggests the jury was confused or misled by the instruction. *Goldfarb v. The Robb Report Inc*., 101 Ohio App.3d 134, 143, 655 N.E.2d 211 (10th Dist.1995); *Wilburn v. Cleveland Elec. Illuminating Co.*, 74 Ohio App.3d 401, 412, 599 N.E.2d 301 (8th Dist.1991); *Oatman v. Frey*, 108 Ohio App. 72, 79, 160 N.E.2d 664 (3d. Dist.1958). [Defendant's] argument is purely speculative. *Goldfarb*, 101 Ohio App.3d at 143, 655 N.E.2d 211. We also note that "prejudice resulting from an improper jury instruction on punitive damages is corrected by vacating the punitive damage award and allowing the balance of the decision to stand."

> *Id.; see Logsdon v. Graham Ford Co*., 54 Ohio St.2d 336, 341, 376 N.E.2d 1333 (1978) (reversing award of punitive damages because instruction on that issue was not warranted). In this case, there is no punitive damage award to vacate. We, therefore, conclude that the trial court's error in failing to bifurcate the trial and giving an instruction on punitive damages was harmless because it did not affect [Defendant's] substantial rights. *Civ. R. 61; see Goldfarb*, 101 Ohio App.3d at 143, 655 N.E.2d 211; *Wilburn*, 74 Ohio App.3d at 412, 599 N.E.2d 301; *Oatman*, 108 Ohio App. at 79, 160 N.E.2d 664.

Id. at ¶ 20.

{¶ 60} The same reasoning applies in the case before us. Since the jury failed to find malice, any alleged error would have been harmless. We also agree with Cavins that not only did Black Stone fail to object to the few instances where evidence of malice was introduced, the issue of malice was also intertwined with whether Black Stone's stated reasons for terminating Cavins were a pretext. *See Luri v. Republic Servs., Inc.*, 2014-Ohio-3817, 18 N.E.3d 844, ¶ 11 (8th Dist.) (noting that evidence that defendant's "employees fabricated evidence in an attempt to establish that [plaintiff] was terminated for cause was introduced to demonstrate malice. This evidence of malice is so intertwined with appellees' defense that it cannot feasibly be left out of the compensatory damage phase.")

{¶ 61} In *Luri*, the court of appeals went on to conclude, however, that a new trial was warranted, based not on the evidence of malice, but on the fact that evidence of the defendant's wealth had been presented during the original trial. *Luri* at ¶ 12-13. In this

regard, the court of appeals stressed that " '[t]he most common reason for bifurcating is to exclude evidence of the defendant's wealth or net worth from the compensatory damages phase * * *.' " *Id.* at ¶ 12, quoting *In re Hawaii Fed. Asbestos Cases*, 9th Cir. Nos. 90-16668, 90-16802, 90-16669, 90–16803, 1992 WL 78092, *1 (Apr. 20, 1992). (Other citation omitted.)

{¶ 62} In contrast to *Luri,* no evidence of Black Stone's wealth was presented in the case before us. Accordingly, even if the trial court had erred, any error was harmless. As we said, however, Black Stone's position at trial is unclear from the record, and it is impossible to determine what Black Stone intended.

{¶ 63} Based on the preceding discussion, the First Assignment of Error is overruled.

III. Manifest Weight Argument

{¶ 64} Black Stone's Second Assignment of Error states that:

> The Verdict Was Against the Manifest Weight of the Evidence.

{¶ 65} Under this assignment of error, Black Stone contends that the verdict was against the manifest weight of the evidence. In this regard, Black Stone relies on four primary assertions: (1) Cavins failed to prove she was regarded as disabled; (2) Cavins did not prove she could perform the essential functions of a home care nurse; (3) Cavins failed to prove that Black Stone's legitimate business reason for the discharge was a pretext; and (4) the damages award is not rationally related to evidence in the record.

{¶ 66} Before we address these issues, we note that the standards we apply to manifest weight challenges are well-established. In *Eastley v. Volkman*, 132 Ohio St.3d

328, 2012–Ohio–2179, 972 N.E.2d 517, the Supreme Court of Ohio held that civil cases should be governed by the manifest weight standards outlined in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). *Id.* at ¶ 17. Consequently, in civil cases, "[w]hen a [judgment] is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact 'clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.' " *State v. Hill*, 2d Dist. Montgomery No. 25172, 2013-Ohio-717, ¶ 8, quoting *Thompkins* at 387. "A judgment should be reversed as being against the manifest weight of the evidence 'only in the exceptional case in which the evidence weighs heavily against the [judgment].' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

A. Proof of Disability

{¶ 67} As was noted, Black Stone first contends that Cavins failed to prove she was disabled. Disability discrimination is governed by R.C. Chapter 4112. In pertinent part, R.C. 4112.02 states that:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the * * * disability * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

{¶ 68} "Because Ohio's own antidiscrimination laws found in R.C. Chapter 4112 are modeled after Title VII, * * * 'federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112.' " *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 12, quoting *Plumbers & Steamfitters Joint Apprenticeship Commt.*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128 (1981).

{¶ 69} In *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir.2005), the Sixth Circuit Court of Appeals noted that:

> When reviewing the facts of a discrimination claim after there has been a full trial on the merits, we must focus on the ultimate question of discrimination rather than on whether a plaintiff made out a prima facie case. *See Noble v. Brinker Intern., Inc*., 391 F.3d 715, 724-26 (6th Cir.2004)(noting that when the case proceeds to a full trial on the merits, the district court is "in a position to decide the ultimate factual issue in the case, that is, whether the defendant intentionally discriminated against the plaintiff)." Thus, "the proper inquiry following the presentation of all evidence in a Title VII case is whether plaintiff has proven its case by a preponderance [of the evidence.]" *EEOC v. Avery Dennison Corp*., 104 F.3d 858, 862 (6th Cir.1997). Nonetheless, the evidentiary underpinnings of a plaintiff's prima facie case are not irrelevant or insulated from our examination to aid our determination whether the evidence is sufficient to support a finding of intentional discrimination. *Noble*, 391 F.3d at 725.

Barnes at 736.

{¶ 70} "To establish a prima facie case of disability discrimination under R.C. 4112.02, a plaintiff must show that: (1) the employee was disabled, (2) that the employer took adverse employment action against the employee, which was caused, at least in part, by the employee's disability; and that (3) despite the disability, the employee can safely and substantially perform the essential functions of the job, with or without a reasonable accommodation." *Sheridan v. Jackson Twp. Div. Fire*, 10th Dist. Franklin No. 08AP-771, 2009-Ohio-1267, ¶ 5, citing *Columbus Civil Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 571, 697 N.E.2d 204 (1998), and *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 302, 658 N.E.2d 738 (1996).

{¶ 71} In *Hood*, the Supreme Court of Ohio commented that:

> Once the plaintiff establishes a prima facie case of handicap discrimination, the burden then shifts to the employer to set forth some legitimate, nondiscriminatory reason for the action taken. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm*. (1981), 66 Ohio St.2d 192, 197, 20 O.O.3d 200, 203, 421 N.E.2d 128, 132. Legitimate, nondiscriminatory reasons for the action taken by the employer may include, but are not limited to, insubordination on the part of the employee claiming discrimination, or the inability of the employee or prospective employee to safely and substantially perform, with reasonable accommodations, the essential functions of the job in question. *See, e.g.*, Ohio Adm.Code 4112-5-08(D)(4) and (E). Finally, if the employer establishes a nondiscriminatory reason for the action taken, then the employee or prospective employee must demonstrate that the employer's

> stated reason was a pretext for impermissible discrimination. *Plumbers & Steamfitters Joint Apprenticeship Commt., supra*, 66 Ohio St.2d at 198, 20 O.O.3d at 203, 421 N.E.2d at 132.

Hood at 302.

{¶ 72} R.C. 4112.01(A)(13) defines a disability as "a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment." Drug addiction is included within the definition of a "mental or physical impairment" pursuant to R.C. 4112.01(A)(16)(a)(iii).

{¶ 73} When the trial court denied Black Stone's motion for JNOV, it noted evidence that Black Stone was made aware of and had concerns regarding Cavins' drug impairment. The court further stressed that the evidence was "replete with testimony and exhibits that these concerns substantially limited the 'life activity' of work." Doc. #143, Decision and Entry, p. 2. In responding to this ruling, Black Stone argues that there was no evidence that Black Stone made such a claim, and that Cavins denied the use of any illegal drug.

{¶ 74} Black Stone was clearly concerned about the possibility that Cavins had a drug problem, and refused to let Cavins return to work until she had a note from a doctor stating that she could safely work while using medication. "[U]nder the plain language of R.C. 4112.01(A)(13), a plaintiff may be disabled if their employer regarded them as having a mental or physical impairment, without regard to whether the employer regarded them as substantially limited in their daily life activities as a result." *Dalton v. Ohio Dept.*

Rehab. & Corr., 10th Dist. Franklin No. 13AP-827, 2014-Ohio-2658, ¶ 24, citing *Scalia v. Aldi, Inc*., 9th Dist. Summit No. 25436, 2011-Ohio-6596, ¶ 24.

{¶ 75} In *Wells v. Cincinnati Children's Hosp. Med. Ctr.*, 860 F.Supp.2d 469 (S.D.Ohio 2012), a nurse was subjected to adverse employment actions (removal from a unit and demotion to a lower-paying position), because her employer perceived her as being disabled due to her use of opiate-based medication to assist with gastrointestinal problems. *Id.* at 472-476 and 480-481. In assessing whether summary judgment should be granted to the employer, the court noted that neither the Americans With Disabilities Act Amendments Act of 2008 ("ADAAA") nor the Ohio Civil Rights Act "require an individual alleging that her employer regarded her as disabled to show that the employer also believed that the perceived disability limits a major life activity." (Citations omitted.) *Id.* at 478. Based on the record, the court concluded that there was "sufficient evidence * * * to demonstrate to a reasonable juror that [the Defendant] regarded Plaintiff as disabled and took adverse employment action against the Plaintiff on the basis of a perceived disability." *Id.*

{¶ 76} In this regard, the court made the following comments about the employer's refusal to reinstate the plaintiff to her former unit after she had been suspended based on concern over her use of medication:

> In their briefs, the parties discuss Plaintiff's disability discrimination claims in the context of the *McDonnell Douglas* framework for analyzing indirect evidence of discrimination. The Court, however, finds that the record contains direct evidence that CCHMC perceived Plaintiff as being disabled and denied her reinstatement on that basis. "[D]irect evidence of

discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co*., 319 F.3d 858, 865 (6th Cir.2003). In this case, Ballinger indicated in her deposition that Plaintiff's impairment or impairments formed the basis of the decision not to reinstate her to the Critical Airway unit. Ballinger Dep. at 102-04. Additionally, Rodell's follow-up report to the OBN indicates that Plaintiff's health-related problems were the reason she was not reinstated to the Critical Airway unit. Rodell told the OBN that "[t]he risk of Ms. Wells repeating past errors and reverting to the behaviors that gave rise to her fitness for duty assessment is not one the management of A4North Surgery is willing to accept." Doc. No. 42-1, at 6. This evidence directly shows that CCHMC believed that Plaintiff's health condition precluded her from performing as a nurse in the Critical Airway unit.

Since there is direct evidence that Plaintiff's impairment or impairments were the reason she was not reinstated to the Critical Airway unit, the *McDonnell Douglas* burden-shifting format does not apply. *Monette v. Electronic Data Sys., Corp*., 90 F.3d 1173, 1184 (6th Cir.1996). Rather, when there is direct evidence that the employer relied on the employee's disability in making an adverse employment decision, in order to prevail on a disability discrimination claim, the plaintiff must prove that she is "disabled" within the meaning of the act and that she was otherwise qualified for the position with or without a reasonable accommodation, or

> with a[n] alleged essential job function eliminated. *Id.* at 1186. If the plaintiff proves those two elements, the burden shifts to the employer to demonstrate that the challenged job criterion is essential or that a proposed accommodation will impose an undue hardship upon the employer. *Id.* Additionally, by statute, an employer has available an affirmative defense that employing the individual in the position in question will "pose a direct threat to the health and safety of other individuals in the workplace." 42 U.S.C. § 12113(b); *see also* 29 C.F.R. § 1630.2(r). In this case, there is sufficient evidence for Plaintiff to meet her burden of proof on the first two elements.

(Footnote omitted.) *Wells* at 479-80.

{¶ 77} The court went on to note that:

> The gastrointestinal problems which caused Plaintiff nausea, vomiting, and diarrhea clearly qualify as a physiological disorder. Moreover, to the extent that the side effects of Plaintiff's proper use of prescription medication adversely affected her ability to work, it would contribute to a finding that she was disabled. *Sutton v. United Air Lines, Inc*., 527 U.S. 471, 482, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) ("Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures-both positive and negative–must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."). And, despite Dr. Miller's report, there is evidence that Plaintiff's use

> of prescription medication was appropriate. The results of Plaintiff's first drug test were within the limits of her prescription and the second drug test detected no opiods [sic] or other controlled substances at all. To the extent that Plaintiff's blackout, confusion, and disorientation were caused by Lotronex, these would obviously be negative side affects [sic] of her attempts to ameliorate her gastrointestinal condition. Accordingly, the record establishes sufficiently that Plaintiff is or was disabled within the meaning of the ADAAA.

(Footnote omitted.) *Wells*, 860 F.Supp.2d at 480-481.

{¶ 78} We see little distinction between the fact situation in *Wells* and the case before us. Like the plaintiff in *Wells*, Cavins was taking measures (prescription medication) to correct or mitigate an underlying physical condition – injuries caused by one or more auto accidents. Accordingly, there was sufficient evidence to allow the jury to conclude that Cavins was perceived as disabled within the meaning of R.C. 4112.02(A)(1) and R.C. 4112.01(A)(13).

{¶ 79} As an additional matter, the fact that Cavins denied using illegal drugs is irrelevant. The drug in question was prescribed by a doctor to treat Cavins' pain and medical issues that resulted from the auto accidents; it was not an illegal substance.

{¶ 80} Finally, we note that the jury was in the best position to assess witness credibility. We have previously stressed that our court "will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the factfinder lost its way." (Citation omitted.) *State v. Bradley*, 2d Dist. Champaign No. 97-CA-03, 1997 WL 691510, *4 (Oct. 24, 1997). *Accord State v. Mitchell*, 2014-

Ohio-5070, 21 N.E.3d 1124, ¶ 54 (2d Dist.). In light of the evidence that Cavins was perceived to have a disability as required by statute, the jury did not clearly lose its way on this issue.

B. Performance of Essential Functions

{¶ 81} Under this branch of its argument, Black Stone contends that there is no evidence other than Cavins' "self-serving testimony" that she could perform her duties as a health care nurse at the time of her termination. Black Stone also relies on the fact that Cavins applied for and received temporary total compensation from the Bureau of Workers' Compensation for about two-and-a-half years after she was terminated. According to Black Stone, this is inconsistent with the claim that she could perform her duties, and the trial court, therefore, should have applied the doctrine of judicial estoppel.

{¶ 82} Prior to the termination, Cavins' family doctor told Black Stone that Cavins could safely work with the Fentanyl patch. He also provided Cavins with a doctor's excuse from employment from July 22 through July 29, 2011, and stated that she could return to work on August 1, 2011. Before Cavins would have been returned to work, she was terminated. In responding to Black Stone's motion for JNOV, the trial court noted Cavins' testimony that she could perform her job as a healthcare nurse because she did not need to lift any patients. The court further noted Cavins' testimony that she could continue working with or without a Fentanyl patch. Cavins informed Black Stone of this latter fact in an email sent to her supervisors on July 21, 2011, prior to the termination, but Black Stone never responded.

{¶ 83} On July 29, 2011, Cavins' doctor, Dr. Nguyen, signed Cavins' request to the

Bureau of Workers' Compensation ("BWC"), indicating that Cavins was disabled from working from July 29, 2011 through August 27, 2011, due to neck and bilateral shoulder pain. Defense Ex. HHH. This was based on an examination that was conducted on July 29, 2011. Cavins stated on the application that she understood she was "not permitted to work while receiving temporary total compensation." *Id.* As was noted, Cavins was released to return to work in December 2013, and returned to duty with modified hours in February 2014.

{¶ 84} In *Smith v. Dillard Dept. Stores*, *Inc.*, 139 Ohio App.3d 525, 744 N.E.2d 1198 (8th Dist.2000), an employer contended, as Black Stone does here, that an employee suing for disability discrimination should be judicially estopped from arguing that she could work, due to her receipt of temporary total compensation from BWC. However, the court of appeals rejected this contention for several reasons. First, the court observed that judicial estoppel "applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Id.* at 533, citing *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998), and *Teledyne Indus., Inc. v. Natl. Labor Relations Bd.*, 911 F.2d 1214, 1217 (6th Cir. 1990). In this regard, the court of appeals concluded that, even if the employee had taken a contrary position during BWC proceedings, the employer failed to show that the prior position had been taken under oath. *Id.* Therefore, judicial estoppel would not apply.

{¶ 85} The court of appeals went on to stress that:

> Even in cases where an employee has asserted in a sworn statement, as required to receive Social Security Disability Insurance

("SSDI") benefits, that she was totally disabled, the employee is not automatically precluded from showing that she could "perform the essential functions" of her job with reasonable accommodation to support a discrimination in employment claim based upon the Americans with Disabilities Act of 1990 ("ADA"), Section 12111 et seq., Title 42, U.S. Code. *See Cleveland v. Policy Management Sys. Corp*. (1999), 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 966. As the court noted, "[t]he Social Security Act and the ADA both help individuals with disabilities but in different ways." *Id.*, 526 U.S. at 801, 119 S.Ct. at 1601, 143 L.Ed.2d at 973. It reasoned that Cleveland's pursuit and receipt of SSDI benefits, where she represented that she was unable to perform the tasks of her prior position and was unable to pursue other gainful employment, did not estop her from pursuing an ADA claim because the SSDI representations did not take into consideration the possibility of her employer making a reasonable accommodation. In clarifying conflicts among the federal courts, the court indicated that the contradictions at issue here were not purely factual, as they involved a conflict in the legal conclusion based upon the purported facts. *Id.*, 526 U.S. at 804-807, 119 S.Ct. at 1603-1604, 143 L.Ed.2d at 975-977. Therefore, the court concluded, Cleveland's "explanation [of the conflict] must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or [Cleveland's] good-faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.' " *Id.*, 526 U.S. at

> 807, 119 S.Ct. at 1604, 143 L.Ed.2d at 977. Because we determined earlier that judicial estoppel does not apply in the first instance, we need not apply *Cleveland* to distinguish the legal conclusions one may draw based upon the purported facts and the application of workers' compensation and handicap discrimination laws.

Smith, 139 Ohio App.3d at 533-534, 744 N.E.2d 1198. *Accord Hoback v. City of Chattanooga*, 550 Fed.Appx. 257, 260 (6th Cir.2013), quoting *Johnson v. Oregon*, 141 F.3d 1361, 1370 (9th Cir.1998) (" 'the law does not require plaintiffs to choose between applying for benefits and pursuing an ADA claim. They may do both.' ")

{¶ 86} We agree with the observations in *Smith*. Judicial estoppel does not apply because there was no indication that Cavins made her statements to the BWC under oath. Nonetheless, Cavins also established that she could have continued to perform her job *at the time she was terminated* because she did not lift patients in her job.[8] She could also have continued working if Black Stone had accommodated her by permitting her to use the pain patch. The fact that Black Stone stated it would allow the use of the patch with a doctor's note indicates that the use was not considered unreasonable. However, rather than even attempting to make this accommodation, Black Stone terminated Cavins a few days after she provided a note from her doctor. Cavins also offered to work without the patch.

{¶ 87} " '[T]he "reasonableness" of an accommodation ordinarily presents a question of fact for the jury to decide.' " *Mitnaul v. Fairmount Presbyterian Church*, 149

---

[8] At the time Cavins was fired, she had not filed for temporary disability, and her doctor's note indicated that she could return to work.

Ohio App.3d 769, 2002-Ohio-5833, 778 N.E.2d 1093, ¶ 45 (8th Dist.), quoting *Smith* at 534. Again, the jury was in the best position to resolve conflicts in testimony. Because there was evidence from which a jury could find that Cavins could safely and substantially perform the essential functions of the job, with or without a reasonable accommodation when she was terminated, we cannot find that the jury lost its way and created a manifest miscarriage of justice.

C. Evidence Relating to Pretext

{¶ 88} Black Stone's third argument is that Cavins did not prove that Black Stone's legitimate business reason for discharging her was a pretext. In this regard, Black Stone relies on its legitimate reasons for termination, including the HIPAA violation and Cavins' prior disciplinary actions.

{¶ 89} Again, referring to the federal decision in *Wells*, the court concluded in that case that direct evidence of discrimination existed because the employer had taken adverse employment actions due to the plaintiff's perceived disability. As a result, the court stated that the "*McDonnell Douglas* burden-shifting format" would not apply. *Wells*, 860 F.Supp.2d at 479-480, citing *Monette*, 90 F.3d at 1184, *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Instead, after a plaintiff meets her initial burden, the employer has the burden "to demonstrate that the challenged job criterion is essential or that a proposed accommodation will impose an undue hardship upon the employer." *Id.* at 480, citing *Monette* at 1186.

{¶ 90} In the case before us, there was direct evidence of disability discrimination,

because Black Stone's employees stated that Cavins was terminated, in part, because of her use of the Fentanyl patch.[9] Black Stone also failed to meet its burden, because it made no showing with respect to the fact that an accommodation would impose an undue hardship on Black Stone. Specifically, Cavins was fired very shortly after she provided a note indicating that she could safely work with the patch, and without any further investigation by Black Stone. Notably, Black Stone, itself, indicated that providing such an assurance was an appropriate accommodation. Therefore, allowing Cavins to work after supplying a note from her doctor could not have imposed an undue hardship on Black Stone – at least, without further demonstration that Cavins could not safely carry out her duties. This would have required further investigation.

{¶ 91} Accordingly, we conclude that Cavins was not required to establish pretext, and that Black Stone failed to meet its burden. However, assuming for the sake of argument that pretext had to be proven, we will consider the pretext issue.

{¶ 92} "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Knepper v. Ohio State Univ*., 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12, citing *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000). "Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against

---

[9] One of the Black Stone employees testified that Cavins was terminated for the HIPAA violation, and this is the only ground listed on one of the termination documents, i.e., the Employee Disciplinary Record signed by Melanie Mobley. *See* Plaintiff's Ex. 18. However, other managerial employees, who participated in the termination, testified that the Fentanyl patch was a factor.

him." *Id.*, citing *Johnson v. Kroger Co.,* 319 F.3d 858, 866 (6th Cir. 2003). "A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.*, citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

{¶ 93} "Pretext exists when an employer does not honestly represent its reasons for terminating an employee." *Miller v. Eby Realty Group LLC*, 396 F.3d 1105, 1111 (10th Cir.2005). "And while rejection of the employer's explanation does not compel a finding of discrimination, 'it is permissible for the [factfinder] to infer the ultimate fact of discrimination from the falsity of the employer's explanation.' " *Id.*, quoting *Reeves v. Sanderson Plumbing Prods*., *Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

{¶ 94} As a preliminary matter, we note that Black Stone's "Employee Disciplinary Record," dated July 22, 2011, lists the alleged HIPAA violation as the only stated reason for termination. Plaintiff's Ex. 18. This violation occurred when Cavins allegedly contacted a former patient to whom she was no longer assigned. However, Cavins denied doing this, and the jury could have chosen to believe Cavins.

{¶ 95} In its brief, Black Stone argues that Cavins failed to present admissible proof of the falsity of this justification for her termination. However, Cavins' denial was admissible proof, and the only evidence presented by Black Stone was that an undisclosed employee "told" Cavins' supervisor about a contact. The jury was not required to believe this testimony.

{¶ 96} In this regard, Black Stone also argues that a belief that Cavins violated HIPAA means that the stated reason was not "false," whether or not Black Stone was

legally correct. This is similar to the argument that an employer's "honest belief" precludes a finding of pretext "if the employer honestly, but mistakenly, believes in the proffered reason given for the * * * decision at issue * * *." (Citations omitted.) *Ceglia v. Youngstown State Univ.*, 10th Dist. Franklin No. 14AP-864, 2015-Ohio-2125, ¶ 45. "The key inquiry in assessing whether an employer holds such an honest belief is 'whether the employer made a reasonably informed and considered decision before taking' the complained-of action." *Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 598-99 (6th Cir.2007), citing *Smith v. Chrysler Corp*., 155 F.3d 799, 807 (6th Cir.1998). "An employer has an honest belief in its rationale when it 'reasonably relied on the particularized facts that were before it at the time the decision was made.' " *Id.*, citing *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir.2001).

{¶ 97} " 'When the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process "unworthy of credence," then any reliance placed by the employer in such a process cannot be said to be honestly held.' " *Smith v. Dept. of Pub. Safety*, 2013-Ohio-4210, 997 N.E.2d 597, ¶ 79, quoting *Smith*, 155 F.3d at 807-808.

{¶ 98} After receiving a report from a co-employee about what Cavins allegedly said about contacting former patients, Black Stone did not conduct any investigation. In fact, the supervisor who was told this (Melissa Mobley) testified that she did not know if it was true. Prior to firing Cavins, Black Stone did not obtain information from Cavins, nor did Black Stone attempt to contact any former patients of Cavins to ascertain whether they had, in fact, been contacted by Cavins, and if so, whether any specific HIPAA

violations occurred. *Compare Smith*, in which the Ohio Department of Public Safety conducted an extensive investigation including interviews with the plaintiff and several independent witnesses before terminating the plaintiff, who was a state trooper. *Smith,* 2013-Ohio-4210, at ¶ 20-42. *See also Horsley v. Burton*, 4th Dist. Scioto No. 10CA3356, 2010-Ohio-6315, ¶ 3-9 and 52 (prior to the alleged incident, employee received prior warnings about copying patient records; employer relied on two eyewitnesses to employee's subsequent improper copying and removal of patient records; employer met with employee to discuss allegations, thus allowing him to respond; and employer investigated the matter before terminating employee).

{¶ 99} Accordingly, in view of Black Stone's failure to conduct any investigation, its reliance on the alleged HIPAA violation cannot be said to have been honestly held, so as to preclude a finding of pretext.

{¶ 100} Cavins also testified that after she met with her supervisors about the Fentanyl patch on July 11, 2011, she understood from their demeanor and conduct, and the way they treated her at the meeting, that they did not want her to work there anymore. In addition, Cavins testified that she was told in a subsequent meeting with her supervisors (prior to the time that the alleged HIPAA violation arose), that she was a liability to the company because she was wearing a pain patch. And, although Cavins complied with Black Stone's request to bring in a doctor's note showing that she could safely work, she was terminated only a few days later for a reason that the jury could have decided was false.

{¶ 101} Unlike the Employee Disciplinary Record, Black Stone's July 22, 2011 termination letter to Cavins lists the alleged HIPAA violation and also mentions the prior

discipline actions. Plaintiff's Ex. 20. Again, this is an inconsistency. Furthermore, Black Stone's employees contradicted each other about the reasons for the termination, with one stating that the Fentanyl patch was not part of the termination discussions. This contrasts with testimony from other employees indicating the Fentanyl patch was a factor.

{¶ 102} Moreover, even if one assumes that the basis for the termination included the prior disciplinary actions, there was evidence that these alleged violations were not actual violations of Black Stone policy, or that other employees were not similarly disciplined. In short, the record contains evidence that Black Stone's actions were poorly documented, and that its policies were inaccurately and inconsistently applied. For example, although Black Stone disciplined Cavins for failing to request a day off in writing, the company failed to submit evidence of a written policy or form to this effect, and there was evidence from an employee other than Cavins that she had been allowed to submit an oral vacation request without being disciplined. Cavins also testified that she had never been required to submit a written request. Again, the jury was permitted to believe Cavins' evidence.

{¶ 103} According to Black Stone, the trial court erred, when denying the motion for JNOV, by stating that July 2011 was the first time Cavins was told that she would have to submit documentation daily. Black Stone submits that this is incorrect, and that if the trial judge was confused, the jury would have been similarly confused. However, evidence at trial supports the court's statement.

{¶ 104} Specifically, Cavins testified that she was only required to submit documentation, including progress notes, on a weekly basis. As was previously noted, this is consistent with Black Stone's policy manual. Furthermore, while Cavins'

supervisor testified that Cavins was supposed to submit documentation daily, the verbal warning record of May 23, 2011, states that the "Deadline for turning in written work and electronic documentation is 8 am Monday morning – no exceptions." (Emphasis sic.) Plaintiff's Ex. 4. This supports Cavins' testimony that documentation was due weekly, and conflicts with Mobley's testimony at trial. Although Mobley testified that she probably made a mistake in writing out this disciplinary report, the jury was entitled to disbelieve her explanation. Thus, the record contained evidence supporting the conclusion that Cavins was not told prior to July 2011, that she had to submit documentation daily.

{¶ 105} Furthermore, regarding the Fentanyl patch, the disciplinary report does not indicate that Cavins was being disciplined for *using* medication that had been prescribed. Instead, the alleged violation was that she failed to *report* her prescribed medication to Black Stone. However, Black Stone's policies did not require employees to *report* their prescribed medication to their employer.

{¶ 106} " 'An employer's changing rationale for making an adverse employment decision can be evidence of pretext' to establish discrimination." *Sells v. Holiday Mgt. Ltd.*, 10th Dist. Franklin No. 11AP-205, 2011-Ohio-5974, ¶ 27, quoting *Thurman v. Yellow Freight Sys., Inc.,* 90 F.3d 1160, 1167 (6th Cir.1996), *amended on other grounds*, 97 F.3d 833 (6th Cir.1996). "The factfinder is entitled to infer from any 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' in the employer's proffered reasons for its action that the employer did not act pursuant to those reasons * * * . If the factfinder concludes that one of the employer's reasons is disingenuous, it is reasonable for it to consider this in assessing the credibility of the employer's other proffered reasons." *Miller*, 396 F.3d at 1112, quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319,

1323 (10th Cir.1997).

{¶ 107} "In drawing such inference, the factfinder must be able to conclude, based on a preponderance of the evidence, that discrimination was a determinative factor in the employer's actions – simply disbelieving the employer is insufficient. * * * However, the evidence establishing the prima facie case, along with the reasonable inferences drawn therefrom, coupled with a disbelief of the employer's explanation, can be sufficient to make this finding." *Id.* at 1111, citing *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097, 147 L.Ed.2d 105. (Other citations omitted.)

{¶ 108} Under the circumstances as discussed above, the jury did not clearly lose its way and commit a manifest miscarriage of justice by concluding that Black Stone improperly discharged Cavins due to a perceived disability.

D. Alleged Error in Awarding Damages

1. Back Pay

{¶ 109} Black Stone's final argument is that the damages award bears no rational relationship to the evidence in the record. In this regard, Black Stone first argues that Cavins was not entitled to the $125,000 award in back pay because she failed to mitigate her damages. In particular, Black Stone again relies on the fact that Cavins, while applying for workers' compensation, stated that she was unable to work.

{¶ 110} We have already rejected Black Stone's argument for judicial estoppel, based on the differences between the purposes underlying workers' compensation and the statutes allowing recovery for disability discrimination. Furthermore, as Cavins points out, the applications for workers' compensation acknowledge only that Cavins was

not permitted to work while receiving workers' compensation; it was not an admission that Cavins was unable to work, or that she could not work with reasonable accommodations.

{¶ 111} Black Stone raised mitigation of damages as an affirmative defense in its answer and submitted a jury instruction on mitigation. See Doc. #82 at p. 17. However, no instruction on mitigation was given, and Black Stone failed to object to its exclusion. *See* Trial Transcript, p. 420. Black Stone also did not argue mitigation during closing argument. Under the circumstances, we conclude that Black Stone waived the issue pursuant to Civ.R. 51(A), which states that "[o]n appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury."

{¶ 112} An exception to waiver was found in in *Presley v. Norwood*, 36 Ohio St.2d 29, 303 N.E.2d 81 (1973), which held that:

> Where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and that the complaining party has unsuccessfully requested the inclusion of that law in the trial court's charge to the jury, such party does not waive his objections to the court's charge by failing to formally object thereto.

Id. at paragraph one of the syllabus.

{¶ 113} However, this exception does not always apply. It is "most appropriately applied when the appellant formally requested a particular instruction and the transcript of the trial reflects that the issue had been argued to the trial court during a conference

or hearing on the jury instructions." *DuBoe v. Accurate Fabrication*, 10th Dist. Franklin No. 98AP-842, 1999 WL 33893941, *4 (July 20, 1999), citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 61, 567 N.E.2d 1291 (1991). (Other citations omitted.) *Accord Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 315, 736 N.E.2d 517 (10th Dist.1999).

{¶ 114} As was previously noted, the transcript of the jury instruction conference was not recorded, and we have no idea what discussion took place. We also have no idea what Black Stone's strategy was when its counsel failed to object before the jury retired and also failed to argue mitigation of damages during closing argument. Accordingly, under the circumstances, we see no reason to apply an exception to the waiver doctrine. We note that while Black Stone is not technically challenging the exclusion of a mitigation instruction, the jury would not have considered mitigation unless it was so instructed.

{¶ 115} Nonetheless, even if we were to consider this alleged error under the plain error doctrine, we would reject it. The plain error doctrine is not favored in civil cases and "may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus.

{¶ 116} "The principle of mitigation of damages, applicable in a suit to recover compensation for a period of wrongful exclusion from employment is an affirmative defense and the burden of proof on that issue resides upon the employer responsible for

the wrongful discharge." *State ex rel. Martin v. City of Columbus, Dept. of Health*, 58 Ohio St.2d 261, 262, 389 N.E.2d 1123 (1979), paragraph three of the syllabus. The doctrine "is intended to prevent an inclusion in the damage award of damages that could have been avoided by reasonable affirmative action by the injured party without substantial risk to such party." (Citation omitted.) *Czarnecki v. Basta*, 112 Ohio App.3d 418, 423, 679 N.E.2d 10 (8th Dist.1996).

{¶ 117} "The purpose of a back-pay award is to make the wrongfully terminated employee whole and to place that employee in the position the employee would have been in absent a violation of the employment contract. * * * This purpose is consistent with the general precept in breach-of-contract actions: 'Money damages awarded in a breach of contract action are designed to place the aggrieved party in the same position it would have been in had the contract not been violated.' " *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶ 26, quoting *Schulke Radio Prod., Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436, 439, 453 N.E.2d 683 (1983). (Other citation omitted.)

{¶ 118} In *Stacy*, the Supreme Court of Ohio concluded that the court of appeals had erred in failing to offset an employee's back pay award by the retirement benefits the employee had received from the state employees' retirement system while he was wrongfully excluded from employment. *Id.* at ¶ 32-42. The rationale was that if the retirement payments were not deducted, the employee would receive more than he would have absent the breach of contract, whereas "the purpose of a back-pay award in a case involving a wrongfully excluded public employee is to put the employee in the same position the employee would have been in had the employer honored the contract." *Id.*

at ¶ 33.

{¶ 119} However, *Stacy* also distinguished two situations where an offset is not required. The first involved the collateral source rule, which indicates that evidence of compensation from collateral sources " 'is not admissible to diminish the damages for which a *tort-feasor* must pay for his negligent act.' " (Emphasis sic.) *Id.* at ¶ 38, quoting *Pryor v. Webber*, 23 Ohio St.2d 104, 263 N.E.2d 235 (1970), paragraph two of the syllabus. Because the action before it was a contract action rather than a tort action, the Supreme Court of Ohio concluded that the collateral source rule did not apply. *Id.*

{¶ 120} The second situation involved "noncontract claims in which deterrence or punitive purposes were evident." *Stacy*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, at ¶ 40. In this regard, *Stacy* cited civil rights cases where courts had refused to deduct unemployment compensation benefits from back-pay awards. *Id.*, citing *Ohio Civ. Rights Comm. v. David Richard Ingram*, *D.C., Inc.*, 69 Ohio St.3d 89, 630 N.E.2d 669 (1994). (Other citations omitted.) In *Ingram*, the Supreme Court of Ohio noted that "R.C. 4112.05 attempts not only to compensate victims of unlawful discrimination and make the victim whole, but also to deter discrimination from occurring in the first place. However, allowing the discriminating employer to deduct unemployment benefits from a back pay award would benefit the employer by reducing the deterrence against discriminatory conduct while conferring no gain upon the victim." *Id.* at 95.

{¶ 121} Similarly, workers' compensation claims that were paid have also been included within the collateral source rule and "evidence of such recovery is not properly admitted to the jury." *Berge*, 136 Ohio App.3d at 328, 736 N.E.2d 517, citing *Pryor* at

109. Consistent with the comments of the Supreme Court of Ohio in *Stacy*, the Sixth Circuit Court of Appeals has held that "[a]pplying the collateral source rule in the employment discrimination context prevents the discriminatory employer from avoiding liability and experiencing a windfall, and also promotes the deterrence functions of discrimination statutes." *Hamlin v. Charter Tp. of Flint*, 165 F.3d 426, 434 (6th Cir.1999). Thus, the Sixth Circuit has refused to allow unemployment benefits and workers' compensation benefits to be deducted from a jury's award of back pay. *Id.*, citing *Thurman*, 90 F.3d at 1171.[10]

{¶ 122} Accordingly, even if Black Stone had not waived mitigation of damages, the jury did not create a manifest miscarriage of justice by awarding back pay for a time period when Cavins was unemployed and receiving workers' compensation benefits. There was evidence in the record to support the award of back pay. As was discussed above, Cavins testified that she was able to perform her job at the time she was terminated, and that she could have performed the job with or without an accommodation. Furthermore, contrary to Black Stone's assertions, Cavins, herself, testified about the amount of her prior wages, and therefore gave the jury a sufficient basis for awarding back pay. *Compare Sicklesmith v. Chester Hoist*, 169 Ohio App.3d 470, 2006-Ohio-6137, 863 N.E.2d 677, ¶ 88-89 (7th Dist.) (indicating that the jury could have computed the amount of an employee's front and back pay based on evidence about his hourly rate

---

[10] The Supreme Court has subsequently indicated that the common law collateral source rule was "largely abrogated by the enactment of R.C. 2315.20" in 2005. *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, ¶ 1. This has no effect on the discussion in the main text, which simply outlines the purposes of back pay awards in civil rights cases. Furthermore, the fact that damages awards in civil rights cases may not be offset is not based on the common law collateral source rule, but on the policy of deterrence. *Hamlin* at 434.

and the amount of weekly wages before his injury).

{¶ 123} At trial, Cavins testified that she normally made between 40 and 70 visits per week to patients, and that during the last week of her employment, she had been reduced to nine visits at $30 per visit. At the pay rate of $30 per visit, Cavins would normally have made between $62,400 and $109,200 per year. Cavins also testified that after she returned to work in February 2014, she made about $300 per week due to her restrictions. She stated that this amount was supplemented by the BWC, such that she was making about two-thirds of her prior average weekly rate, which was approximately $1,500. Trial Transcript, p. 88.

{¶ 124} Cavins was terminated on July 22, 2011, and she returned to work in February 2014, about two and a half years later. At Cavins' average pay rate of $1,500 per week, the lost wages amounted to about $226,200.[11] Even at the lowest rate based on 40 visits per week, the lost wages would have been $179,400.[12] The jury verdict of $125,000 in back pay was well below these amounts.

{¶ 125} Finally, as Cavins points out, Black Stone failed to present any evidence about jobs that were available. *See, e.g., State ex rel. Martin v. City of Columbus, Dept. of Health*, 58 Ohio St.2d 261, 265, 389 N.E.2d 1123 (1979) (indicating that where the

---

[11] This is based on the following computations. $1,500 per week x 130 (approximately two and a half years, converted into weeks, that Cavins was unemployed) = $195,000. For approximately 26 weeks after Cavins returned to work until the August 2014 trial, the $1,500 reduced by $300 received from employment = $1,200 per week. 26 x $1,200 = $31,200. $195,000 plus $31,200 = $226,200.

[12] This is based on the following computations. 40 visits x $30 = $1,200 per week. $1,200 x 130 (approximately two and a half years, converted into weeks, that Cavins was unemployed) = $156,000. For approximately 26 weeks after Cavins returned to work, the $1,200 reduced by $300 received from employment = $900. 26 x $900 = $23,400. $156,000 plus $23,400 = $179,400.

affirmative defense of mitigation is asserted, an alleged wrongdoer fails to meet its burden where no evidence is presented that "suitable jobs for the appellant were available during the period of her unemployment.") As a result, even if Black Stone had properly asserted the mitigation defense, it failed to meet its burden of establishing that Cavins failed to mitigate her damages.

2. Front Pay

{¶ 126} Black Stone's second argument is that Cavins should not have recovered front pay because there was no specific evidence of her current rate of pay or the rate of pay paid to her in February 2014.

{¶ 127} "[F]ront pay is an equitable remedy designed to financially compensate employees where 'reinstatement' of the employee would be impractical or inadequate. In such circumstances an award of front pay enables the court to make the injured party whole, although reinstatement is the preferred remedy." *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 246, 543 N.E.2d 1277 (1989). In *Worrell*, the court indicated that:

> Among the factors to be considered in determining damages for lost future wages where an employee has been wrongfully discharged are (1) the age of the employee and his or her reasonable prospects of obtaining comparable employment elsewhere; (2) salary and other tangible benefits, such as bonuses and vacation pay; (3) expenses associated with finding new employment; and (4) the replacement value of fringe benefits, such as an automobile and insurance for a reasonable time until new employment is obtained.

(Footnotes omitted.) *Id.* at 247.

{¶ 128} The jury was instructed on these specific factors, and awarded Cavins $75,000 in front pay. Again, contrary to Black Stone's claims, there was specific evidence regarding Cavins' pay rate. As was noted, Cavins testified that after she returned to work in February 2014, she made about $300 per week due to her restrictions. She stated that this amount was supplemented by the BWC, such that she was making about two-thirds of her prior average weekly rate, which was approximately $1,500. Trial Transcript, p. 88. At the time of trial, Cavins was 43 years old. No evidence was presented that she would return to less restricted duties or to a greater number of hours in the near future that would permit her to earn more than $300 per week.

{¶ 129} In view of the above facts, the evidence was adequate to allow the jury to compute front pay. *Sicklesmith*, 169 Ohio App.3d 470, 2006-Ohio-6137, 863 N.E.2d 677, at ¶ 88-89.

{¶ 130} We have also already rejected the idea that Black Stone would be entitled to credit for the amounts paid by the BWC. At $300 per week, Cavins' yearly income would be $15,600, or approximately $62,400 less than her prior average salary. The damages awarded for front pay thus encompassed slightly more than one year, which is reasonable, particularly since Cavins was still under treatment. Furthermore, even if Black Stone were credited with the amounts paid by the BWC, Cavins' income would still fall short of her prior average salary by about $25,974 per year. In that instance, an award of $75,000 would cover less than three years of the shortfall. Awarding this amount would not have constituted a manifest miscarriage of justice.

{¶ 131} In *Worrell*, the court stated that "front-pay damages are temporary in

nature, as they are designed to assist the discharged employee during the transition to new employment of equal or similar status." 45 Ohio St.3d at 246, 543 N.E.2d 1277. In particular, the court was concerned in Worrell about the prospect of awarding front pay "from the date of discharge until some anticipated retirement date." *Id.* at 247. In this regard, the court stressed that "[f]ront pay should be awarded for an interim period in circumstances where the discharged employee has employable and productive years ahead." *Id.* Given Cavins' relatively young age, she would have many more years of potential employment, and even three years of front pay, in comparison, was reasonable.

{¶ 132} At trial, Cavins' counsel proposed a total award of $622,728.08 in damages, including $237,764 in back pay, $200,000 in compensatory damages, and the rest ($184,964.08) in front pay. The amount awarded was well below these amounts, and was not excessive. *See, e.g., Shore v. Fed. Exp. Corp*., 42 F.3d 373, 378 (6th Cir.1994), quoting *Fite v. First Tennessee Production Credit Assn*., 861 F.2d 884, 893 (6th Cir.1988) (" 'because future damages are often speculative,' flexibility and wide discretion are especially important when a court's remedies for a Title VII violation include front pay.") (Other citation omitted.)

3. Compensatory Damages

{¶ 133} Black Stone's final argument is that the compensatory damages award is not based on any competent evidence, and was not supported by expert testimony. After hearing the evidence, the jury awarded Cavins $50,000 in compensatory damages.

{¶ 134} In *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, the Supreme Court of Ohio stated that:

> In *Fantozzi* [*v. Sandusky Cement Prods. Co*.], 64 Ohio St.3d [601], at 612, 597 N.E.2d 474 [1992], we defined "compensatory damages" in such a way that it includes both economic and noneconomic damages: "Compensatory damages are defined as those which measure the actual loss, and are allowed as amends therefor. For example, compensatory damages may, among other allowable elements, encompass direct pecuniary loss, such as hospital and other medical expenses immediately resulting from the injury, or loss of time or money from the injury, loss due to the permanency of the injuries, disabilities or disfigurement, and physical and mental pain and suffering." Usually awarded for pain and suffering, noneconomic damages can also include compensation for loss of ability to perform usual functions; loss of consortium, mental anguish, or other intangible loss; and humiliation or embarrassment.

(Footnotes omitted.) *Id.* at ¶ 19.

{¶ 135} With respect to physical injuries, it is true that "[w]here the permanency of an injury is obvious, such as the loss of a limb, the jury may draw its own conclusions as to the measure of damages. * * * If the injury is not obvious, however, then there must be expert evidence as to the damage sustained, the probability of future pain and suffering, or the permanency of the injury." (Citation omitted.) *Hileman v. Kramer*, 2d Dist. Montgomery No. 15066, 1995 WL 765959, *9 (Dec. 29, 1995), citing *Corwin v. St. Anthony Med. Ctr.*, 80 Ohio App.3d 836, 840-41, 610 N.E.2d 1155 (10th Dist.1992). Nonetheless, Cavins did not contend that Black Stone caused her physical injury and resulting pain and suffering from the injury, and there is no requirement of expert

testimony.

{¶ 136} "Under Ohio law, even without proof of contemporaneous physical injury, one may recover for mental anguish, humiliation or embarrassment." *Brooks v. Montgomery Care Ctr.*, 1st Dist. Hamilton No. C-130838, 2014-Ohio-4644, ¶ 12, citing *Schultz v. Barberton Glass Co*., 4 Ohio St.3d 131, 447 N.E.2d 109 (1983), syllabus. The jury's "function [is] to assess the damages and, generally, it is not for a trial or appellate court to substitute its judgment for that of the trier of fact." *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 40, 543 N.E.2d 464 (1989).

{¶ 137} At trial, Cavins testified that she had been forced to file for bankruptcy as a result of the termination and her resulting loss of income. Cavins further testified that in addition to incurring filing fees for the bankruptcy, her relationships with creditors and others had been affected. She also stated that she was humiliated. In addition, Cavins testified about stress and stomach issues while she worked at Black Stone, due to her employers' attitude.

{¶ 138} Under the circumstances, there was sufficient proof of compensatory damages, and the jury did not clearly lose its way and create a manifest miscarriage of justice. *Compare Ward v. Hengle*, 124 Ohio App.3d 396, 405, 706 N.E.2d 392 (9th Dist.1997) (award of compensatory damages reversed because plaintiff, who had been terminated, failed to offer "any evidence that he suffered any emotional impact, inconvenience, or any other type of nonmonetary suffering whatsoever. There was no evidence from which the jury could even infer that [the plaintiff] experienced any pain or suffering"); *McDonald v. Burton*, 2d Dist. Montgomery No. 24274, 2011-Ohio-6178, ¶ 175 (finding evidence insufficient to support $150,000 compensatory damages award where

plaintiff was subjected to alleged harassing remarks only for a few hours over a two-day period, and presented minimal evidence of actual damages); *Roberts v. Mike's Trucking, Ltd*., 2014-Ohio-766, 9 N.E.3d 483, ¶ 3, 68-69, and 74-75 (12th Dist.) (affirming $42,000 compensatory damages award as not against the manifest weight of the evidence, where lay testimony indicated that supervisor's sexually harassing remarks caused employee to not want to go to work anymore, to become less productive and confident, and to suffer from anxiety); and *Edwards v. Ohio Inst. of Cardiac Care*, 170 Ohio App.3d 619, 2007-Ohio-1333, 868 N.E.2d 721, ¶ 92-93 (2d Dist.) (award of $200,000 in compensatory damages was generous, but not against the manifest weight of the evidence, in case where employee was terminated after being sexually harassed. Employee testified that "she could not sleep or eat, she developed stomach problems and her blood pressure became elevated (160 over 122)." She was also prescribed medication for her stomach, and she had lost 25 pounds from the time the harassment began until she was terminated.)

{¶ 139} Based on the preceding discussion, the judgment was not against the manifest weight of the evidence. Accordingly, Black Stone's Second Assignment of Error is overruled.

IV. Conclusion

{¶ 140} All of Black Stone's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J. and HALL, J., concur.

Copies mailed to:

Dwight D. Brannon
Matthew C. Schultz
Lucian Bernard
Hon. Neal B. Bronson (sitting by assignment)